limitations restrict the speech of those affected by the ownership rules and have applied a higher level of scrutiny to judging their constitutionality, i.e., following the *O'Brien* intermediate scrutiny test.[89] Notably, the Commission itself applied the *O'Brien* test in its review of the Newspaper Rule in the *1998 Biennial Review Order.* The O'*Brien* test states a government action must "advance[] important interests unrelated to the suppression of free speech and [does] not burden substantially more speech than necessary to further those interests.""

In *Time Warner Entertainment* Co., *v. FCC,*[91] the court applied the *O'Brien* test as it determined the horizontal ownership limit on cable owners "interferes with petitioners' speech rights by restricting the number of viewers to whom they can speak" and the vertical cable ownership limit "restricts their ability to exercise their editorial control over a portion of the content they transmit."[92] It acknowledged the goals of diversity in ideas and speech and the preservation of competition as important governmental interests but found the FCC had not justified "the limits that it has chosen as not burdening substantially more speech than necessary."[93] In addition, the court held "the FCC must show a record that validates the *regulations,* not just the abstract statutory authority."[94] The court concluded the Commission had not done this and remanded both rules to the Commission. Thus, if the Commission intends on retaining a modified Newspaper Rule, it must first demonstrate how the proposed rule advances the goal of viewpoint diversity.

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[88] *NCCB*, 436 U.S. at 801.
[89] *United States v. O'Brien*, 391 U.S. 367,377 (1968), *reaff'd in Turner Broad. Sys., Inc. v. FCC, 520* U.S. 180, 189 (1997) (*"Turner II"*).
[90] *1998 Biennial Review Order,* 15 FCC Rcd at 11121.
[91] 240 F.3d 1126 (2001) *("Time Warner II").*
[92] *Id.* at 1129.
[93] *Id.*
[94] *Id.* at **1130** (emphasis in original).

a) The Newspaper Rule does not "advance" a substantial government interest.

The Commission must show the record validates the regulation, as required by ***Turner I***. The nexus between the Newspaper Rule and viewpoint diversity, however, cannot be demonstrated. The overwhelming factual record supplied in the previous proceeding and the Pritchard studies show no pattern of editorial bias exists among commonly-owned newspapers and television stations.[95] And, as Chairman Powell observed, "I also fail to see how ownership restrictions in themselves do much to promote the goal of antagonism. . . the ownership class may include different people, but it is hard to see how that ensures that they are different in their viewpoints."[96] Thus, the Commission cannot claim the record validates the regulation. Moreover, since few broadcast stations editorialize, there is little likelihood of opinion programming overlapping with the editorial page of the newspaper.

b) The Newspaper Rule unduly restricts First Amendment freedoms.

Because of its sweeping scope, the Newspaper Rule also fails to meet the second prong of the ***O'Brien*** test, i.e., "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[97] The straitjacket puts small, family owned properties on the same footing with large, diversified media companies, and small towns on the same footing as major cities, with no regard for the number of competitors present.[98] In striking down the cross-ownership ban on common ownership of a local exchange telephone company in the same service area as a cable television company,[99] the Court of Appeals for the

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[95] ***See supra,*** note 14.
[96] ***1998 Biennial Review Order,*** 15 FCC Rcd at 11149 (separate statement of Commissioner Powell).
[97] ***O'Brien,*** 391 U.S. at 377.
[98] The Newspaper Rule **is** overbroad, but any attempt to craft a more narrowly tailored rule will not survive review under the Biennial Review Standard. ***See*** discussion, ***supra*** at 11-12 and ***infra*** at 28-31
[99] Cable Franchise Policy and Communications Act of 1984 § 533(b).

Fourth Circuit faulted the Commission for failing to consider other "less drastic regulatory schemes that might achieve the substantial government interests" at stake.'" The Court of Appeals for the Ninth Circuit applied intermediate scrutiny and found the same rule unconstitutional."' Surely the across-the-board ban on common ownership of newspapers and broadcast properties in the same market is too broad to survive the *O'Brien* requirement.

The speculative basis for the Commission's implementation of the Newspaper Rule in 1975 and the current record including the studies of the Media Ownership Working Group do not support any ban on common ownership of a newspaper and other media in a local market. Moreover, Tribune has pointed out that some scaled-back version of the Rule, e.g., banning combinations of newspapers and broadcast stations in certain sized markets, or where there are fewer than a certain number of media "voices" present, will not be effective in promoting diversity.[102] None of the studies in the record provide any guidance to the Commission about precisely how to tailor a modified rule or support for the proposition that a modified rule would advance the Commission's goals. As argued above, the Commission must be able to identify specific evidence to justify both the act of drawing a regulatory line and the placement of the line – and that evidence does not exist.

### 3. The Newspaper Rule is an unreasonable means to maintain or promote diversity and thus fails the rational basis test.

The Newspaper Rule fails to meet even the least restrictive constitutional requirements. The Supreme Court in *NCCB* said the Newspaper Rule was "based on permissible public-interest goals and, so *long as the regulations are not an unreasonable means* for seeking to achieve these

[100] *Chesapeake & Potomac Tel. Co. v. United States,* 42 F.3d 181, 201 (4" Cir. 1994), *cert. granted* 515 **U.S.** 1157 (1995), *vacated* 516 **U.S.** 415 (1996) (made moot by Telecommunications Act of 1996).
[101] *US West, Inc. v. United States,* 42 F.3d 1092 (9" Cir. 1995).

goals, they fall within the [Commission's] general rulemaking authority."[103] Today, the Newspaper Rule is an ***unreasonable*** means to attempt to achieve viewpoint diversity because it is ineffective and actually contravenes the public interest.

In 1975, the Supreme Court gave great deference to the 'predictive judgment' of the Commission, holding that, "notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[104] In the intervening years, however, Congress created an explicit presumption against ownership regulation and in favor of competition which, as discussed above, directs the Commission to deregulate in the absence of evidence to the contrary.

a) <u>The evidence in 1975 showed no need for the Newspaper Rule and the record over the intervening years strongly confirms that conclusion.</u>

The lack of irrefutable evidence demonstrating the need for the Newspaper Rule was acknowledged by the *NCCB* court:

> "[T]he Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice' or are harmful to competition. . . In the Commission's view, the conflicting studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive, and no pattern of specific abuses by existing cross-owners was demonstrated."[105]

As pointed out above, the studies in the previous record on the Newspaper Rule and the more recent Media Ownership Working Group studies demonstrate that a cross-ownership prohibition

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[102] Tribune Comments 2001 at 72-77.
[103] *NCCB*, 436 **U.S.** at 796 (emphasis added).
[104] ***See id.***
[105] ***See id.*** at 786 (emphasis added).

between newspapers and broadcast stations of any sort is not needed to protect or promote viewpoint diversity

The lack of evidence put forth by the Commission in 1975 to justify its imposition of a sweeping ban on a class of potential broadcasters would not suffice today. The Supreme Court has said the Commission must do more than "simply 'posit the existence of the disease sought to be cured.'. . . It requires the FCC draw 'reasonable inferences based on substantial evidence.'"[106] The previous record and the additional Media Ownership Working Group studies do not provide any evidence, let alone substantial evidence, for the Commission to conclude diversity is harmed by a commonly-owned newspaper and broadcast station in a local market. Nor is there any evidence, let alone substantial evidence, that the Newspaper Rule promotes viewpoint diversity. The substantial evidence is to the contrary: the Newspaper Rule harms diversity by denying the public access to the superior news-and-information-gathering resources provided by local newspaper-broadcast combinations.[107]

In 1978, the Court also noted the Commission's "own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed 'an undramatic but nonetheless statistically significant superiority' over other television stations."[108] What should have developed in the years between the Supreme Court's decision in *NCCB* and today's examination of the evidence is a record that demonstrates the accuracy of the Commission's "predictive

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[106] ***See Time Warner II,*** 240 F.3d at 1133, ***citing Turner I***, 512 U.S. at 664,666, ***quoting Quincy Cable TV, Inc. v. FCC***, 768 F.2d 1434, 1455 (D.C. Cir. 1985);***see also Bechtel v. FCC***, 10 F.3d 875,880 (D.C. Cir. 1993)("There comes a time when reliance on unverified predictions begins to look a bit threadbare.").
[107] Tribune Comments 2001 at 44-53; Tribune Comments 1998 at 59-76; ***see also*** Spavins, Thomas, et al. The Measurement of Local Television News and Public Affairs Programs (FCC Media Ownership Working Group Report #7.)
[108] *NCCB*, 436 U S . at 807.

judgment." Instead, the Pritchard studies find no pattern of editorial bias or slant in the content of commonly-owned local newspapers and broadcast stations.[109] In addition, there is fresh evidence local newspaper-broadcast combinations provide more news and public affairs programming, receive two to three times the average number of awards when compared to other broadcast stations, and serve their audiences with more and better news and public affairs programming.[110] In short, the passage of time has shown the Commission's original predictions to be simply erroneous speculation.

b) Congress has eliminated the Commission's predictive judgment as the basis for ownership rules.

Congress, in adopting the Biennial Review Standard, flipped the legal presumption from one of great deference to the Commission's predictive judgment to the expectation that ownership rules will be repealed unless they can be shown, with substantial evidence, to be necessary. In ***Fox Television,*** the court discredited the predictive judgment approach of the Commission in light of the statutory Biennial Review Standard, saying "The Commission's wait-and-see approach cannot be squared with its statutory mandate promptly . . . to 'repeal or modify' any rule that is not 'necessary in the public interest."'"[111] In ***Sinclair,*** Judge Sentelle said the Commission "seems to have assumed the need for the rule, and then attempted to justify it." Judge Sentelle would have vacated the local television rule because he read the Biennial Review Standard to require repeal once the court determined the Commission failed to justify the rule as necessary.[112]

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[109] ***Supra*** n.14.
[110] ***Supran.lO.***
[111] *Fox* ***Television,*** 280 F.3d at 1042.
[112] ***Sinclair,*** 284 F.3d at 170-71.

In reviewing the Commission's attempt to reinstitute and modify the syndication and financial interest rules, the Court of Appeals for the Seventh Circuit found the Commission failed to demonstrate these rules were a reasonable means to promote diversity.[113] Not only did the court criticize the Commission for failing to define "diversity" and to show the presumed interaction between program diversity and viewpoint diversity,[114] it went on to attack the Commission for failing to articulate an adequately-reasoned basis for imposing new program ownership restrictions on the networks. "Stripped of verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin."[115] The court vacated the ban on network ownership and syndication of programming as "unreasoned and unreasonable."[116] Similarly, in striking down the comparative licensing criteria the Commission had promulgated in the name of competition and diversity, the court said, "Despite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate it achieves even one of the benefits the Commission attributes to it. As a result, the Commission ultimately rests its defense of the integration criterion on the deference that we owe to its 'predictive judgments.'"[117]

Even where the Supreme Court has acknowledged "courts must accord substantial deference to the predictive judgments of Congress,"[118] it found the second set of must carry rules as reinstated by the Commission to be defective: "Without a more substantial elaboration . . . of the predictive or historical evidence upon which Congress relied, or the introduction of some

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[113] *Schurz Comm. Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).
[114] *See id.* at 1054 ("while the word diversity appears with incantatory frequency in the Commission's opinion, it is never defined.").
[115] *See id.* at 1050, *citing Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610,626-27 (1986) (plurality opinion); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).
[116] *Schun Comm. Inc*, 982 F.2d at 1055.
[117] *Bechtel v. FCC*, 10 F.3d 875,880 (D.C. Cir. 1993)
[118] *Turner I*, 512 U.S. at 665.

additional evidence to establish that the . . . broadcasters would be at serious risk . . ., we cannot determine whether the threat to broadcast television is real enough.""'

c) With no modifications and only four waivers granted in its 27 year history, the Newspaper Rule is unreasonable as applied.

The Newspaper Rule is also unreasonable because of its broad scope. In 1978, the Court downplayed the impact of the Newspaper Rule, characterizing the Commission's action as a decision to "try out a change in licensing policy."[120] The Court was also persuaded the scope of the Rule was not overbroad because waivers were available,[121] yet only four waivers have been granted.[122] After 27 years of enforcement almost without exception, it is clear what began as an experiment in licensing policy has hardened into an unyielding cross-ownership ban. The absence of virtually any modification and the grant of only four waivers of the Newspaper Rule stand in contrast to the outright elimination or drastic contraction of other media ownership rules in the same period of time.[123] Prohibiting a large group of speakers from participating in the broadcasting business in the markets where they own daily newspapers, and vice-versa, is unacceptable. A blanket prohibition against newspaper owners using their superior newsgathering resources to improve local television news programming is both ironic and overreaching. The Newspaper Rule is fatally overbroad in scope and is not a reasonable means to achieve any legitimate government goal in 2002.

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[119] *See id.* at 667.
[120] *NCCB*, 436 U.S. at 811.
[121] *See id.* at 802, n.20.
[122] *See Field Communications Corp.*, 65 FCC 2d 959, 961 (1977); ***Fox*** *Television Stations, Inc., Request for Waiver of the Broadcast-Newspaper Cross-Ownership Rule Relating to WNYW and the New York Post*, 8 FCC Rcd 5341 (1993), *aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995); *Kortes Communications, Inc.*, 15 FCC Rcd 11846 (2000); *Columbia Montour Broadcasting Co., Inc.*, 13 FCC Rcd 13007 (1998).
[123] *See, e.g., Amendment of Section* **73.3555** *of the Commission's Rule, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1741 (1989) (radio-television cross-ownership relaxation); *Revision of Radio rules and Policies*, 7 FCC Rcd 6387 (1992) (local radio ownership limits).

## IV. Cross-ownership rules like the Newspaper Rule are no longer supportable as a means to maintain and promote diversity.

Attempting to impose ownership prohibitions across media to achieve viewpoint diversity causes irreparable harm to the public and to those who would otherwise be able to hold broadcast licensees in communities where they own a newspaper. Certainly, the evidence compiled to date regarding commonly owned newspapers and broadcast stations shows there is no reason to limit such ownership in the abstract hope of promoting viewpoint diversity.

While people may substitute media for one another to some extent, the courts have found combinations of newspapers and other media do not pose a business risk even if they serve similar audiences. In a careful antitrust analysis of the various media in Arkansas, the trier of fact wrote:

> The local daily newspaper provides a unique package of information to its readers. Foremost, it provides national, state and local news. Many of the stories, such as those on high school sports and city council meetings, are of purely local interest. Readers also value other features of a local nature, including calendars of local events and meetings, movie and TV listings, classified advertisements, other local advertising, legal notices, and obituaries.. . . Moreover, a newspaper is portable and allows readers access to information at their own convenience.
>
> The peculiar characteristics and uses of other media outlets are completely different. National and state newspapers have a similar format to local papers, but they contain no local news or advertising, which is a critical factor in the acceptance and success of a local daily. . . .On the other hand, weekly papers offer purely local news, and as weeklies, they offer virtually no time sensitivity. Radio news and television news are also poor substitutes for local papers. Television and radio are primarily dedicated to entertainment, and to the extent that they offer news and information, they lack breadth and depth of coverage. Also, they are not portable and convenient like newspapers.[124]

This description helps to point out how much of an "apples and oranges" comparison the Commission would face in trying to establish a system for computing the number of "voices" in a market, and presumably, an ownership limit based on some sort of "total point score." Tribune

has previously explained it would be folly to expect an unassailably objective bright-line test to determine the degree to which myriad different competitive voices in a market 'compete' with one another."'

**A** "voices" test that equates newspapers with broadcast outlets would also be inherently unworkable and unfair because there are no empirical facts on which to determine the weight of each local newspaper relative to each local television and radio station, let alone cable operators, the Internet, and other media in each market. No matter how many voices exist in a market, if one is not producing local news or broadcasts only national news, then its combination with a local newspaper leads to an increase in local news voices. Even if the station is producing local news, the record demonstrates that combination with a newspaper will strengthen that product. More importantly and as evidenced in Tribune's cross-owned markets, even in markets with relatively few stations, allowing combinations with a newspaper will increase the quality of local coverage.[126] Also, a voices test raises the problem of weighing media outlets of different sizes, types, and influence – apples, oranges, bananas, mangoes, and more. More importantly, a computation of ownership limits based on the number of voices in a market will require ever-changing calibration of the voices in the market as changes in the media landscape occur.

In today's super-competitive media marketplace, it is folly for the Commission to attempt to quantify the degree to which various media are substitutes for one another, particularly with respect to viewpoint diversity. Moreover, the Commission has no experience in regulation of print media and no authorization to do so. Yet that is the practical impact of a ban on station ownership by a newspaper. Faced with a new, higher level of evidence necessary for judicial

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[124] ***Community Publishers. Inc. v. Donrey Corp.,*** 892 F. Supp. 1146, 1155-6 (W.D. Ark. 1995).
[125] Tribune Comments 2001 at 12-73; ***see*** *also supra* at 10-12.

review it cannot meet based on the record developed to date, the Commission should abandon any effort at adopting cross-ownership limitations.

## V. Conclusion

**All** the facts are in – the record has been complete with respect to the Newspaper Rule for years. There is no need for more hearings or more opportunities to add to the already bountiful record. Stripped of hyperbole and abstraction, and reduced to fact, more information will only underscore what is already known: since 1975 there has been no evidence local newspaper-broadcast combinations harm viewpoint diversity. Indeed, the continued proscription on these combinations harms the public by impeding newsgathering synergies that improve the scope and quality of local coverage. In the many grandfathered combinations (such as Tribune's in Chicago), these combinations improve local news coverage. This improvement would take place in more markets if the Newspaper Rule were repealed.

The Newspaper Rule should be terminated promptly even if the omnibus biennial review of the Commission's ownership rules requires further proceedings. The only developments in the year since the last round of comments regarding the Newspaper Rule are the appellate decisions in ***Fox Television*** and ***Sinclair*** and the undertaking by the Commission of 14 comprehensive media studies. Both cases underscore the deregulatory presumption in the statutory Biennial Review Standard. *Fox* ***Television*** articulates with resolute clarity that a cross-ownership rule unsupported by substantial evidence will be vacated. The burden rests squarely on those seeking to justify this archaic, injurious regulation. The FCC's studies show no evidence supporting retention of the Newspaper Rule and provide much documentation

[126] Tribune Comments 2001 at 46-55; Tribune Comments 1998 at 59-71

supporting its repeal. The Commission should follow the *Fox Television* court's guidance and immediately repeal the Newspaper Rule.

Respectfully submitted,

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January 2,2003

**Attachment A**

Before the
Federal Communications Commission
Washington, D.C. 20554



| | |
|---|---|
| In the Matter of | |
| Cross-Ownership of Broadcast Stations And Newspapers | MM Docket No. 01-235 |
| Newspaper/Radio Cross-Ownership Waiver Policy | MM Docket No. 96-197 |

**REPLY COMMENTS OF TRIBUNE COMPANY**

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| Newspaper/Radio Cross-Ownership Waiver Policy. | ) | |

# **REPLY** COMMENTS **OF** TRIBUNE COMPANY

Tribune Company ("Tribune") submits the following Reply Comments in regard to th Notic f Proposed Rulemaking ("Notice") issued by the Federal Communications Commission ("FCC or "Commission") reviewing, *inter alia*, the daily newspaper-broadcast common ownership rule (the "Rule" or the "cross-ownership rule"), codified at **47** C F R. 73 3555(d) (2000).

## INTRODUCTION

The comments filed in this proceeding are uniform in their regard for the important role newspapers play in informing our citizenry and covering news at the local level.[1] All filing comments **also** concur **on** the public interest benefits of local news coverage and agree

[1] **See.** *e.g.*, Comments of Consumers **Union,** Consumer Federation of **America,** Civil **Rights Forum,** Center for Digital Democracy. Leadenhip Conference on Civil **Rights** and Media **Access Project.** (collectively. "Consumers Union, et. al.") supporting **the** Rule's retention **and** citing newspapers for their "unique **role** [in] **reporting** as a fourth estate. checking waste. fraud **and** abuse of **power by** governments and **corporations."** Id. at **15. They** later correctly report "Newspapers devote greater attention to **local** news and **provide** a distinct role **through** broad, deep coverage **and** investigative reporting." Id. at 63.

broadcasters and publishers face unprecedented competition from media forms not in existence when the Rule was adopted 27 years ago The comments diverge over whether common ownership of a newspaper and broadcast station in the same market enhances or harms a broadcaster's ability to provide local news and public affairs programming within a diverse media environment. On this point, the data and other factual information provided by those who oppose the Rule stand in sharp contrast to the outdated theories offered by the Rule's proponents.

The detailed analysis and facts marshaled by those opposing the Rule describe how the Rule harms the quality, quantity and diversity of local programming. The comments describe how cross-ownership brings the assets of American's best news sources to consumers who choose to inform themselves via television. The uncontroverted facts show that markets with newspaper/television combinations remain intensely competitive and do not suffer from the diversity-related concerns used to justify the Rule in 1975. This factual record supporting the liberation of publishers to compete in the broadcasting marketplace is overwhelming, especially when compared to the evidentiary vacuum offered by defenders of the Rule. Given this record, the Commission's obligation is unmistakable: the Rule must be repealed.

## I. THE RECORD SHOWS THAT THE ANTICIPATED HARMS OF CROSS-OWNERSHIP ARE MYTH: MULTIPLE VOICES AND COMPETITION THRIVE IN MARKETS WHERE CROSSOWNERSHIP EXISTS.

### A. Evidence From Cross-Owned Markets Supports Repeal Of The Rule.

When the Commission adopted the newspaper-broadcast cross-ownership ban more than a quarter century ago, it did so in the face of an impressive and consistent record of newspaper publishers' civic-minded stewardship of broadcast stations.[2] The Commission adopted

[2] *See* Comments of Tribune Company at 6-7 The evidence obtained during the public rulemaking process provided *(Continued)*

the Rule based on an unproven theory that viewpoint diversity and competition would be enhanced by prohibiting common ownership; however the Commission allowed approximately 442 then-existing newspaper/broadcast combinations to continue.[1] In reviewing the wisdom of the Rule's retention, the performance record of these "grandfathered" combinations should be a guide to this Commission.

Like the record in the proceeding adopting the Rule, this record is completely void of any credible evidence that commonly-owned media engage in viewpoint constriction, suppression, censorship or any of the other diversity-related concerns that prompted the Rule Advocates favoring retention of the Rule are dismayed about media concentration, shrinking news budgets and insufficient coverage of minority issues, but they cannot identify one single example during the past 27 years that shows cross-owned media eliminating a voice from the marketplace. In fact, new evidence regarding the tendencies of cross-owned media concludes there is "a wealth of 'diverse and antagonistic' information in situations of newspaper/broadcasting cross-ownership."[4]

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little support for the Rule. Instead, the evidence showed broadcan nations owned by newspaper publishers had a "long record of service to the public" and produced a larger percentage of news, public affairs and other public service programming than did independently-owned stations. Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 FCC 2d 1046. 1078, 1132 (¶ 109 & n.26 and Appendix C) (1975). *recon.* 50 FCC 2d 589 ("The Order"). The Commission also found newspaper owners should be credited for their pioneering efforts to launch both radio and television broadcasting. Order at 1074. See also Comments of The National Association of Broadcasters at 39.

[3] The Commission grandfathered approximately 370 of 380 then-existing newspaper/radio combinations and 72 of the 79 then-existing newspaper television combinations. *See*, Comments of Hem-Argyle Television. Inc., at 2. *citing* Multiple Ownership of Standard. FM and Television Broadcast Stations, Second Report and Order. 50 FCC 2d 1046, *recon,* 53 FCC 2d 589.7 2

[4] David Pritchard. A Talc of Three Cities: "Diverse and Antagonistic" Information in Situations Of Local Newspaper/Broadcast Cross-Ownership, 54 Fed. Comm. L. J. 31.49 (Dec. 2001) ("FCLJ").

An independent review and analysis of the coverage and editorial opinions of newspaper/broadcast combinations has found "common ownership does not inevitably result in common viewpoints."[5] The study recorded the "bias," if one could be detected, of hundreds of news reports in Chicago, Dallas and Milwaukee – three markets where common ownership of newspapers and television stations is grandfathered – regarding the hotly-contested 2000 presidential election. Published in December, 2001, the study concluded:

> This Article examined whether three existing newspaper/broadcast combinations in major markets provided information about the 2000 presidential campaign from 'diverse and antagonistic sources.' The results'show clearly that they did provide a wide range of diverse information. In other words, the Commission's historical assumption that media ownership inevitably shapes the news to suit its own interests may no longer be true (if it ever was) . . . .
>
> The evidence of the study reported in this Article suggests that the prohibition on newspaper/broadcast cross-ownership has outlived its usefulness.[6]

The study also concluded,

> [T]he evidence does not support the fears of those who claim that common ownership of newspaper and broadcast stations in a community inevitably leads to a narrowing, whether intentional or unintentional, of the range of news and opinions in the community.'[7]

This analysis is consistent with Tribune's 77 years of experience operating a newspaper and broadcast stations in Chicago.* During that time, as described in Tribune's comments, competition and programming diversity have exploded. The same is true in Dallas/Ft

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[5] FCLJ at 47.

[6] FCLJ at 51.

[7] FCLJ at 49.

[8] *See* Comments of Tribune Company at 38-42.

Worth, where Belo Corp has operated a newspaper/television station combination for 50 years,[9] in Topeka, Kansas, and Amarillo, Texas, where Morris Communication owns newspaper/radio combinations that have existed for 44 years,[10] and throughout the country Based on the record in this proceeding, it is uncontroverted that existing cross-owned markets, both large and small, have exhibited diverse media discourse and vibrant competition.

The most vocal critics of cross-ownership have singled out Tribune Company as a principal target due to our efforts at synergy between print and broadcast properties in common markets.[11] After describing the objectives of content sharing, these advocates caution against hypothetical "dangers" such as the possibility of "favorable newspaper reviews of a broadcaster's programming," or "positive editorials/opinion articles about business interests of a broadcaster or politicians who favor such business interests."[12] Again, however, these theorists provide no evidence of actual harm to the marketplace of ideas that has occurred during Tribune's 77 years of crossownership in Chicago. In fact, in a confusing hairpin discussion of the topic, even these critics of cross-ownership concede, "we do not mean to suggest that there is anything wrong with [Tribune] company's behavior. On the contrary, economic 'synergies' may certainly help Tribune improve the quality of its media products."[13]

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[9] Comments of Belo Corp., at 4-9 and Appendix I.

[10] Comments of Moms Communications Corporation at 7-12, 14-16 and 17-24.

[11] See Comments of Consumers Union. et. al, at 63.

[12] *id.* at 64.

[13] *Id.*

**B.** Journalistic Integrity Is Not Compromised By Cross-Ownership.

Those favoring retention of the Rule argue the integrity of print journalists is inevitably compromised whenever their employer acquires a television station in the same market.[14] This misconception is evident in Professor Ben Bagdikian's statement regarding the Los *Angeles Times'* failure to disclose to its journalists in 1999 that it partnered with the Staples Center on a special Sunday newspaper section." Bagdikian correctly points out that this section caused an uproar in which the paper's publisher was accused of violating a long-standing tradition of keeping advertiser influence out of the news. But Bagdikian then attempts to confuse the Commission by alleging this represents an accepted deterioration of news standards caused by corporate ownership. In fact, Bagdikian's presentation reports only half of the story. The remainder of the story confirms that there are forces working in the marketplace that are much more adept at preventing the alleged ills of crossownership than the antiquated Rule.

Far from being accepted, the "Staples Affair" was criticized by journalists locally and nationwide and had enormous cost and consequence to those who allowed it to happen. The issue triggered an editorial house-cleaning in which the publisher and editor of the *Los Angeles Times* were forced out and the newspaper was the subject of enormous public outcry and internal debate and criticism. Even more significantly, the incident contributed to the decision by the owners of the *Los Angeles Times* to seek new stewardship of their company, ultimately merging Times Mirror Company with Tribune in June 2000 Far from symbolizing the deterioration of

[14] See *Id.* at 63.

[15] See Comments of Ben Bagdikian ai 6, Comments of Consumers Union, et. ai.. Appendix A

news standards, the Staples Affair stands for the enduring triumph ofjournalistic principles.[16] Moreover, the story demonstrates that there is a marketplace force that counters the alleged wrongs that proponents of the Rule argue must be prevented.

The reason common-ownership does not threaten journalistic integrity is plain to anyone with media experience. As the FCLJ article notes:

> Journalists are not mindless automatons. Although their work is standardized and routinized to an extent, strong professional norms of autonomy exist in newsrooms across the United States. Any attempt by ownership to influence the slant of political news would certainly be resisted and even revealed by journalists."

Even the Rule's supporters tacitly acknowledge print journalists' independence and integrity, reciting what they term the print journalists' "century-old creed: I believe in the professionalism of journalism. I believe that the public journal is a public trust; that all connected with it are. to the full measure of their responsibility, trustees for the public; that acceptance of lesser service than the public service is a betrayal of this trust."[18] As one would *expect,* it is the experience in cross-owned markets that this century-old commitment to the public trust can only further elevate the standards of broadcast journalism. And again, the Rule's supporters offer no evidence to the contrary

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[16] As former Assistant Manager Editor for National News at the Washington Post, Bagdikian worked at a company that also owns multiple television stations. He claims to have "reponed on and followed broadcast policies and their impact on communities and the country at large for more than SO years." As such. he doubtless had the opportunity to observe *any* impact of common ownership on the coverage or opinions expressed at the Washington Post and other newspapers. Yet notably absent from his comments in this record is any evidence of negauve impact from his personal experience as a journalist. Indeed, the only example he offers from personal experience is an appearance on a radio program in San Francisco in which he was asked not to mention the date or weather so his comments could be sent to others across the country. In conflict with his assertion that common ownership limits diversity, his example illustrates an occasion where his voice presumably increased diversity by being added to a market he would not otherwise reach. See Comments of Ben Bagdikian at 3.

[17] FCLJ at *50.*

C. Competition Is Not Threatened By Cross-Ownership.

The Notice invites comment on the effect of newspaper-broadcast combinations on competition.[19] The comments divide this inquiry into two separate competition analyses: competition for audience and competition for advertising. Supporters of the Rule argue broadcasters and publishers do not compete in the news marketplace. They claim, "broadcasters do not compete against newspapers . . . in the most significant area addressed by this proceeding – news and information."[18] If true, it's difficult to see how allowing a combination of two entities that do not compete would pose significant harm. That is, if the consumer does not use print and broadcast interchangeably, then a newspaper speaking in the broadcast market reaches a new audience and does not reduce competition. Their argument is different, and is compounded by the fact they refuse to realize that multiple media do compete for the consumers' time, as Tribune and others have demonstrated is the reality in today's marketplace. For if they do, the wealth of information and programming choices available makes diversity an inevitable result.

Competition for advertising is a distinctly different question, yet the comments filed in this proceeding yield the same conclusion. The evidence from cross-owned markets demonstrates that robust advertising competition exists notwithstanding common ownership."[20] In response, those supporting retention of the Rule offer examples of cross-ownership synergies and

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[18] Comments of Consumers Union, et. al.. at 63.

[19] Notice, ¶¶ 19-27.

[20] Comments of Consumers Union, *et*, al, at 4, 19 ("different types of media – in this case, print and broadcast – represent distinct product and geographic markets.").

[21] See. *e.g.*, Comments of The Newspaper Association of America at 66-72 & n.194 (citing the "ample evidence to suggest that many alternative outlets compete vigorously with newspapers for advertising revenue."); Comments of The National Association of Broadcasters at 14.

mislabel them as anticompetitive. For example, The United Church of Christ notes Tribune Company offers advertisers in Chicago the opportunity to sponsor WGN-TV's chief meteorologist on both television and in the dedicated weather page of The Chicago Tribune. It claims this gives Tribune an unfair advantage over other broadcasters and the *Chicago Sun-Times,* another Chicago daily newspaper. As criticism, this approach is off base

First, the Commission is not concerned with competition among newspapers. and this proceeding is not intended to protect the interests of individual newspapers, even if there were any impact. Second, and more importantly, not one single complaint has been registered about Tribune's cross-ownership in Chicago, whether from other local broadcasters, the *Sun-Times* or any advertisers. In fact, other broadcasters in Chicago—the parties most likely to be impacted by this hypothetical harm—have filed comments in this proceeding seeking elimination of the Rule.[22] Finally, to the extent such selling were to constitute impermissible "tying," this is precisely the sort of activity the antitrust laws are designed to remedy. Thus, even without the Rule. parties suffering anticompetitive behavior have a forum to express their grievances and laws designed to protect them.

**D.** The Impact Of Cross-Ownership On Jobs Is Pure Conjecture.

Since the occupational security of media employees must be subordinate to the Constitutional and legal mandate at stake in this rulemaking, the Commission need not consider the notion suggested by the AFL-CIO that cross-ownership leads to fewer jobs. Regardless, that notion is purely speculative and fails to consider the number of jobs lost when television stations

[22] *See, e.g.*, Comments of the News Corporation Limited and Fox Television Holdings, Inc. (Fox owns WFLD-TV, Channel 32 in Chicago).

close newsrooms or "outsource" their newscasts because of the expense of producing local news.[23] It also ignores the number of jobs saved when such newsrooms remain open through common ownership with a newspaper. Moreover, the comments offer no evidence that the impact on jobs at grandfathered newspaper/broadcast combinations is greater than at independent newspapers or stations in the same markets."

The AFL-CIO also argues common-ownership poses unfair burdens for journalists who are asked to become involved in multimedia formats." The hallmark of journalism has always been the ability to adapt to modem media – from scribe, to printing press, to telegraph, to radio, to television, to cable. etc. Surely the AFL-CIO does not expect the FCC to restrict newspapers from providing content in the manner the public demands. In any event, consideration of the propriety of new media training strays far from the Commission's stated objective, from Congressional and Constitutional mandate, and from the larger public interest obligation

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[23] See Comments of Tribune Company at 26, 42-43, 49-50 (detailing Tribune's experience in South Florida). Rather than making the enormous capital commitment needed to launch a new newscast, WBZL contracts with NBC-owned WTVJ to purchase a news broadcast. The 30-minute, 10 p.m. news broadcast features on-air talent employed by, and stories generated by, WTVJ's news department. Tribune has little incentive to make a long-term capital investment in a WBZL newscast. Thus, instead of launching a new voice in the market. presumably with new personnel. WBZL airs a newscast produced and staffed by a competitor. *See also* Comments of Consumers Union. et. al, at 80 (trend - with the Rule in place -shows number of television newsrooms is declining); Kathy Bergen, TV news' sacred status now old story, Chi. Trib., Feb. 10, 2002, Business at 1.

[24] The Comments of AFL-CIO are wholly deficient in this regard. There is no doubt some media companies have regrettably been forced to reduce staff, change job functions, or cut cwerage as a result of the economy and declines in readerslup. But the AFL-CIO presents no evidence this impact has k e n greater at stations under common ownership with a newspaper. See. e.g., Drivers approve job cuts avert newspaper's demise, Chi. Trib.. February 3, 2002 (The Jersey Journal, a 135-year-old daily newspaper. forced to cut half its staff to avoid closing its doors due lo declining readership and advertising revenues).

[25] Comments of American Federation of Labor and Congress of Industrial Organizations at 6.